IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* v. AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION, *Defendants.*	)	Civil Action No.: 99-1180-JTM

UNITED STATES' RESPONSE TO AMERICAN'S SUBMISSION REGARDING REMEDY

I. INTRODUCTION

As we understood it from Magistrate Judge Humphreys, the Court has already expressed a preference to address the issue of remedy after it has made its liability determination.[1] The United States concurs with the Court's view and submits this brief response to Defendants' (collectively "American") submission to the Court regarding remedy. What appears to be at the root of American's submission is its desire to pre-argue to the Court the merits of American's defenses

[1] 1/19/01 Pretrial Conf. Trans., at 22:13-19 (emphasis supplied) ("I think there will be further discussion with counsel with Judge Marten about it, but as we discussed it yesterday in anticipation of the conference today, I think he feels that the liability stage of the case is obviously going to have to go forward. *Until there is any proof of liability, the remedy issue doesn't really rise to a level of proof.*").

on the ultimate issue of liability.

American's submission confuses three different issues: (1) what is the *legal standard of liability*; (2) what constitutes relevant, admissible *evidence* of violation of that standard, and (3) whether there is a workable and enforceable *remedy* that could be imposed by the Court should it find in favor of the United States. As to the first, the United States and American have briefed the issue of the legal standard in the summary judgment papers and will again in the trial briefs. As to the second, the United States intends to put on evidence at trial that, taken together, demonstrates that American's conduct violates the legal standards for monopolization and attempted monopolization under the Sherman Act. As to the third, the United States believes that it would be more efficient for the Court to devise an appropriate remedy once it has made findings of fact and conclusions of law on liability.

American's effort to use this opportunity to attack the anticipated testimony of the United States' experts and the legal arguments raised by the United States concerning American's alleged violations of the Sherman Act is inappropriate and should be rejected.[2] Because American has devoted so much time to its discussion of the liability standard, we address this issue first and close with a brief discussion concerning remedy.

II. ARGUMENT

A. American Has Mischaracterized the Liability Standard Proposed by the United States

In an attempt to convince the Court that the United States' claims against American are

[2] This is particularly true, given that American waited until two months after the Pretrial Conference and only a week before the Status Conference to file its submission on remedy.

incorrect, American has blurred the questions of (1) the liability standard, (2) evidence of violation of that standard, and (3) an appropriate remedy for the particular violation. Moreover, American mischaracterizes the liability standard proposed by the United States, stating that the United States proposes as a liability standard, applicable to all cases involving predatory conduct, the application of Professor Berry's four tests.[3] These claims are wrong.

As the United States has stated in its Opposition to American's Motion for Summary Judgment and elsewhere, the standard of liability that the cases set forth, and that the United States advocates, is whether American engaged in otherwise irrational conduct in order to maintain or obtain monopoly power. This liability standard, far from being "novel" as American claims, falls squarely within the existing law relating to exclusionary or predatory conduct. *See generally Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-11 (1985); *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 482-85 (1992); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications,* 63 F.3d 1540, 1550 (10th Cir. 1995) (whether conduct is "an abnormal response").

The application of this liability standard to each case will necessarily depend upon the facts that exist in each case, including facts relating to a particular defendant's conduct, to how a particular market or industry operates, to how revenues and costs are best measured in the market or industry at issue, and similar considerations. Professor Berry's four "tests" provide important

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[3] *See* American's Submission, at 2 ("if [Professor Berry's four] tests were to become the legal standard (and presumably, therefore, part of the remedy) they would be unworkable and would diminish legitimate competition") and 8, n.5 ("The DOJ's liability theories of predation can be grouped into two categories: (1) four 'tests' constructed by Professor Berry . . . and (2) the DOJ's allegations as to several other routes . . . .").

and persuasive evidence that American violated the legal standard, but the United States has never suggested any one or more of the tests *constitute* the legal standard. Only American has said this. Professor Berry's tests, which evaluate American's conduct based on American's own internal measures of profitability, together with substantial additional evidence available in this case, will prove that American violated Section 2. As set forth in the United States' Opposition to American's Motion for Summary Judgment:

> The United States will show that American's conduct was anticompetitive -- that it did not make business sense but for the prospect of anticompetitive gain. The United States' evidence establishes this fact in a number of ways: by demonstrating that American behaved quite differently against the targeted LCCs than it did in other markets when it had no chance of driving out a low-cost competitor, Southwest (Gov't SOF at 203-206); by showing that, after LCCs entered, American reversed its prior decisions to abandon service in those markets (Gov't SOF at 35, 46, 50-51, 60, 151, 171-173, 176); by the fact that American's own internal route and flight performance measures -- the "Decision" measures it designed and consistently used to guide its route and capacity decisions -- took a steep decline and became negative when American saturated the four routes with extra capacity (Gov't SOF at 191-192, 194.5); by the acknowledgment of American's own senior management of what it was doing and why (Gov't SOF at 14-24); by showing that American researched the staying power of its LCC competitors and focused not on its own profits, but on driving the LCCs below their break-even load factor (Gov't SOF at 19-24, 189.4-189.7); and, most tellingly, by demonstrating that when American added capacity on the four routes that the United States has made the focus of this case -- the four "below-cost capacity" or "target" routes -- American's pricing was below cost -- by several appropriate measures. (Gov't SOF at 191, 193.7, 194.5, 195.3.)

(Plaintiff's Memo. in Supp. of Opp. to American's Motion for Summary Judgment, at 17.)

There can really be no dispute that the proper legal standard is whether American engaged in conduct that made business sense only because it helped to maintain or acquire monopoly power. Rather, the parties have joined issue over the evidence relevant to determining that standard: whether, as American contends, the *only* evidence that a plaintiff can rely on to establish that the standard has been violated is whether revenues are below the short run variable cost of a route as a whole,[4] or, as the United States contends, violation of the legal standard can be established through a variety of evidence including evidence of pricing below appropriate measures of cost.

B. The Ultimate Determination of an Appropriate Remedy in this Case Is Within the Sound Discretion of the District Court and Should Follow the Court's Liability Determination

Should the Court find both that the standard advocated by the United States is the appropriate one and that the evidence has established that American engaged in conduct that violated that standard, the fashioning of an appropriate remedy should not prove unduly difficult. The fashioning of appropriate injunctive relief is within the sound discretion of the Court[5] and is an exercise best undertaken after the Court has heard all of the evidence concerning liability. Thus, if this Court finds that American has engaged in exclusionary or predatory conduct by making capacity additions to drive out competitors and maintain monopoly power, the United States will ask this Court to take remedial action that removes the effects of past violations and prevents future violations. Consistent with these principles, the United States has informed American that it intends to seek an injunction that would restrain American from repeating its

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[4] American's claim that the test it has advanced -- a comparison of route revenues with the short-run variable cost of the route -- is a simple implementation of the "widely accepted average variable cost test" is misleading. First, "short-run" variable cost is not the appropriate time period for identifying variable costs in this case. (*See* Plaintiff's Memo. In Supp. Of Opp. To American's Motion for Summary Judgment, at 32 n.27.) Second, American's test includes revenues obtained from multiple fare levels (and, thus, not a single "price"). Third, American's test includes revenues from multiple markets (*i.e*., revenues from both local and connecting passengers being carried on the route).

[5] *See, e.g., Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) ("Since the grant or denial of a preliminary injunction is within the sound discretion of the trial court, we may set aside the court's action only if it instituted an abuse of discretion.")

Sherman Act violation in the future and that would remedy American's prior unlawful conduct by imposing certain narrowly-tailored limitations on American's future conduct.

That addressing remedy after liability is the better procedure is amply demonstrated by American's correct but irrelevant observation that the United States' proposed limitation on American making capacity additions in response to low cost carrier entry is "not a standard for compliance with Section 2." (American's Submission at 5.) A remedy is just that -- a remedy -- not a statement of legal liability standards. Fashioning a remedy that fits the violation (whether it is based on a capacity limitation or some other behavioral constraint) will require the Court to weigh the enforceability and effectiveness of the remedy against other considerations, such as overdeterrence of desirable, procompetitive conduct. While the United States does not believe this will be unduly difficult, it would be a significant and unnecessary distraction from the issues to be addressed in the liability phase.

Ultimately, however, the Court's decision on what remedy to impose on American should the Court find a violation of the Sherman Act should be guided by two simple and well-established principles. The relief should (1) prevent "a recurrence of the violation," and (2) "eliminate [the violation's] consequences." *National Society of Prof. Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *see also United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950) ("A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance."). Once the Court has made a liability determination, the Court can specify the further proceedings necessary for fashioning an appropriate remedy.[6] However, the United States does not believe that it would be worthwhile for either the Court or the parties to expend their limited resources evaluating potential remedies where that exercise is premature.

III. CONCLUSION

The United States thus respectfully requests that the Court bifurcate the liability and remedy phases of this trial and address the issue of an appropriate remedy once a liability determination has been made.

Dated: March 31, 2001

Respectfully submitted,

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/"s"/

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[6] Indeed, further proceedings of this kind are common in antitrust actions brought by the United States under the antitrust laws. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972); *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 320 (1961); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967).